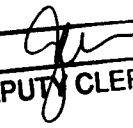


**FILED  
SCRANTON**

**MAR 31 2014**

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA**

PER

  
DEPUTY CLERK

MITCHELL WALL,

Plaintiff,

v.

BRIAN BUSHMAN, DR., J. POTOPE,  
A.H.A., NEYLON, COUNSELOR, and  
Other Unknown Defendants, et al.,

Defendants.

Civil No. 3:12-CV-2112

(Judge Kosik)

**MEMORANDUM**

Before the court are Objections filed by Plaintiff and Defendants to the Report and Recommendation of Magistrate Judge Karoline Mehalchick filed on November 7, 2013 (Doc. 53). For the reasons which follow, we will adopt the Report and Recommendation of the Magistrate Judge.

**BACKGROUND**

Plaintiff, Mitchell Wall, an inmate confined at the United States Penitentiary at Allenwood, White Deer, Pennsylvania, filed the instant civil rights action pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) on October 23, 2012. Plaintiff alleges that Defendants Dr. Brian Buschman, J. Potope, Assistant Health Services Administrator, and Neylon, Unit Counselor, were deliberately indifferent to his medical needs in not assigning him to a lower bunk. On March 4, 2013, Defendants filed a Motion to Dismiss and a Motion for Summary Judgment (Doc. 20). Appropriate briefs and documentation were filed by the parties.

On November 7, 2013, the Magistrate Judge issued a Report and

Recommendation (Doc. 53), wherein she recommended that the court grant Defendants' Motion to Dismiss all Defendants in their official capacities; that the court grant Defendants' Motion to Dismiss Defendants Neylon and Potope; and that the court deny Defendants' Motion for Summary Judgment as to Defendant Buschman. On November 19, 2013, Plaintiff filed an Objection to the portion of the Magistrate Judge's Report and Recommendation that addressed Defendant Potope (Doc. 54). On November 22, 2013, the Defendants filed an Objection to the Report and Recommendation of the Magistrate Judge as it related to Defendant Buschman (Doc. 56). Defendants filed a Brief in Opposition to Plaintiff's Objections (Doc. 57) and Plaintiff filed an Objection to Defendants' Objection (Doc. 58).

#### DISCUSSION

When objections are filed to a Report and Recommendation of a Magistrate Judge, we must make a de novo determination of those portions of the Report to which objections are made. 28 U.S.C. §636(b)(1)(C); see Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). In doing so, we may accept, reject or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. §636(b)(1); Local Rule 72.3. Although our review is de novo, we are permitted by statute to rely upon the Magistrate Judge's proposed recommendations to the extent we, in the exercise of sound discretion, deem proper. United States v. Raddatz, 447 U.S. 667, 676 (1980); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984).

#### PLAINTIFF'S OBJECTIONS

In his Objections to the Report and Recommendation, Plaintiff asks the court to reconsider the Magistrate Judge's recommendation to grant the Defendants' Motion to Dismiss Defendant Potope. Specifically, Plaintiff argues that Defendant

Potope had the authority to grant Plaintiff's request for a lower bunk, but that he denied Plaintiff's request for a lower bunk and told him he did not qualify for one.

In opposition to Plaintiff's Objections regarding Defendant Potope, Defendants refer to the Report and Recommendation's findings that Defendant Potope's duties as Assistant Health Services Administrator are administrative in nature and do not include making clinical decisions regarding any aspect of an inmate's health care. Defendants argue that the authority and/or responsibility to issue new bottom bunk passes lies with medical professionals.

After reviewing Plaintiff's Objections in light of the instant record, we agree with the Magistrate Judge that Defendant Potope's position was administrative in nature, and that he did not make clinical decisions regarding an inmate's health care. Accordingly, we will adopt the Magistrate Judge's recommendation that Defendant Potope's Motion to Dismiss be granted.

#### DEFENDANTS' OBJECTIONS

Defendants filed Objections to the portion of the Magistrate Judge's Report and Recommendation dealing with Defendant Buschman. Specifically, the Magistrate Judge recommended that the court deny Defendants' Motion for Summary Judgment as to Defendant Buschman. The Magistrate Judge found that a genuine issue of material fact existed as to whether Defendant Buschman knew and disregarded the neurosurgeon's recommendation on January 31, 2012, that Plaintiff be issued a lower bunk in light of his existing back condition.<sup>1</sup>

Defendants' Objections argue that Defendant Dr. Buschman cannot be deliberately indifferent for failing to follow a recommendation of another physician,

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<sup>1</sup>See, Doc. 37, Affidavit of Plaintiff, Para. 8.

See, Doc. 28, Exhibit 2, Declaration of B. Buschman, Para. 14.

because a recommendation is advisory in nature and does not have a binding effect. Defendants refer to several cases which consider whether a disagreement of professional opinion among doctors equals deliberate indifference as to create a genuine issue of material fact. As the Magistrate Judge points out, a question of material fact surrounds Defendant Buschman's knowledge and conduct on January 31, 2012, in light of the neurosurgeon's recommendation that Plaintiff be assigned a lower bunk. Accordingly, we will adopt the Magistrate Judge's recommendation that Defendant Buschman's Motion for Summary Judgment be denied at this stage. An appropriate Order follows.

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

MITCHELL WALL,

Plaintiff,

v.

BRIAN BUSHMAN, DR., J. POTOPE,  
A.H.A., NEYLON, COUNSELOR, and  
Other Unknown Defendants, et al.,

Defendants.


Civil No. 3:12-CV-2112

(Judge Kosik)

**ORDER**

AND NOW, THIS 31<sup>st</sup> DAY OF MARCH 2014, IT IS HEREBY ORDERED  
THAT:

- (1) The Report and Recommendation of Magistrate Judge Karoline Mehalchick dated November 7, 2013 (Doc. 53) is **ADOPTED**;
- (2) Defendants' Motion to Dismiss all Defendants in their official capacities (Doc. 20) is **GRANTED**;
- (3) Defendants' Motion to Dismiss Defendants Neylon and Potope (Doc. 20) is **GRANTED**;
- (4) Defendants' Motion for Summary Judgment as to Defendant Buschman (Doc. 20) is **DENIED**;
- (5) Defendant Buschman is directed to file an answer to Plaintiff's Complaint on the Eighth Amendment deliberate indifference claims within twenty (20) days of the date of this Order; and
- (6) The above-captioned action is remanded to the Magistrate Judge for further proceedings.

  
Edwin M. Kosik  
United States District Judge